Filed 9/19/06 In re Brandon L. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re BRANDON L., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. BRANDON L., Defendant and Appellant.	C048464 (Super. Ct. No. 116915)

On October 2, 2003, Brandon L., a minor and ward of the Sonoma County Juvenile Court based upon several previously sustained petitions, admitted charges of battery with serious bodily injury (Pen. Code, § 243, subd. (d)) and witness intimidation (Pen. Code, § 136.1, subd. (a)(1)). On October 22, 2003, in another petition, the minor admitted a charge of conspiracy to commit assault with a deadly weapon. (Pen. Code, §§ 182, 245, subd. (a)(1).)

On December 24, 2003, the minor was committed to the California Youth Authority (CYA) for a 90-day diagnostic evaluation. On May 11, 2004, following the minor's return from CYA, his case was transferred for disposition to Sacramento County. On October 7, 2004, after a contested disposition hearing, the minor was committed to CYA for a maximum confinement period of six years.

On appeal, the minor contends that (1) the court abused its discretion in committing him to CYA; (2) remand is required for the court to exercise its discretion whether to impose less than the maximum period of confinement; and (3) the court miscalculated his maximum period of confinement. We reject the minor's first contention, but agree with him as to the second and third.

DISCUSSION

I

The minor contends that the juvenile court abused its discretion in committing him to CYA because there were less restrictive alternatives available that would meet both his and society's need to be protected. We are not persuaded.

To justify a commitment to CYA there must be evidence in the record demonstrating probable benefit to the minor and evidence supporting a determination that less restrictive alternatives are ineffective or inappropriate. (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576; Welf. & Inst.

Code, § 734.)[1] The juvenile court's decision to commit a minor to CYA will be reversed on appeal only upon a showing that the court abused its discretion in making the commitment. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.)

At the time of the minor's commitment, he was nearly 18 years of age and his record before the juvenile court showed that from March 2002 through October 2003, he had eight sustained petitions (§ 602) and two sustained petitions for violations of probation (§ 777, subd. (a)). His admitted offenses included possessing a locking blade knife on school property, driving without a valid driver's license, being a runaway, unlawfully retaining lost property, committing a battery with serious bodily injury, escaping from probation camp, committing a battery, again escaping from probation camp, and the latest two petitions, in which he admitted offenses of intimidating a witness, committing a battery with serious bodily injury, and conspiring to commit assault with a deadly weapon.

As to these last two petitions, which resulted in the minor's CYA commitment, the facts were as follows:

1. In August 2003, the minor and two companions demanded candy from Ernesto D., while the latter was working at a Chevron gas station. When Ernesto refused, one of the minors warned him he was in "Northern Cali"; they then left. About 11:30 p.m. the same night, Ernesto and Luis C. were outside the gas station

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[1] Undesignated section references are to the Welfare and Institutions Code.

when the minor and five companions surrounded them. In a gang attack, Ernesto was punched, kicked, and hit with a golf club and a baseball bat; Luis was struck in the back with the golf club. The attack ended when a vehicle pulled into the station. This was the factual basis for the charge of conspiracy to commit assault with a deadly weapon.

2. On September 5, 2003, Daniel B. was walking home from school with his sister when the minor confronted Daniel, accusing him of "talking shit" about the minor. The minor challenged Daniel to a fight, however, Daniel's sister intervened. The minor told Daniel that if he heard that Daniel was talking "shit" about him again, "'me and my home boys will beat your ass.'" On September 7, 2003, Daniel, who was 15, and Jesse C., who was 14, were walking in a park when they saw the minor and his companion, Chase L. Fearing a confrontation, Daniel and Jesse split up. However, the minor and Chase managed to confront Jesse. Jesse said that he did not want to fight, nevertheless the minor struck Jesse in the back of the head, knocking him to the ground. When Jesse looked up the minor pointed a gun at him and said, "'I'm gonna smoke this fool.'" Chase told the minor not to do so. Because of his injuries, Jesse did not remember how he had gotten to his home or to the hospital. This was the factual basis for the charge of battery with serious bodily injury.

3. On the evening of September 7, 2003, an officer was interviewing Daniel at Daniel's home when the minor telephoned. The officer posed as Daniel and listened while the minor boasted

of assaulting Jesse, stating, "'I should have smoked [Jesse].'" The minor threatened to harm Daniel if he contacted the police. When told he was speaking with a police officer, the minor hung up the phone. This was the factual basis for the charge of witness intimidation.

Before the minor was sent to CYA for a diagnostic evaluation, he was examined by Drs. Laura Doty and Mark Taradis. The minor admitted to Dr. Doty that he had "set many fires as a young boy" and that he had "a history of animal abuse[,] including killing a cat by stoning it and setting fire to his girlfriend's dog."

After reviewing the minor's history, the Sonoma County Probation Department, the CYA Inter-Disciplinary Team and the Sacramento County Probation Department recommended that the minor be committed to CYA. To the contrary, Drs. Doty and Taradis concluded that the minor's aggressive behavior could be effectively treated in a residential facility specializing in adolescent behavioral problems.

As the minor notes, he had an extremely difficult childhood. His mother and biological father were drug addicts; his mother had left him with strangers. The minor told his mother that he had been sexually molested when he was young. During the minor's early years, his mother admitted to being violent with him--"spanking had turned into hitting." The minor also had problems in school. He was academically far behind the other children and he had speech, reading, auditory processing and memory difficulties.

In spite of the minor's difficult childhood and his criminal orientation, his behavior changed considerably for the better after he was sent to CYA for the diagnostic evaluation. He renounced gang affiliation, he was not aggressive with staff, he qualified for work assignments, he generally had no behavioral problems with other wards, and he got along well with the staff.

After the minor was returned to juvenile hall from the diagnostic evaluation, he was classified as an escape risk and a "Norteño gang member"; however, he earned placement on "honor status and participate[d] in both unit and school programs." It was further noted by staff that the minor "interacts well with other residents and complies with staff instruction."

In anticipation of the disposition hearing, counsel for the minor retained Dr. Mark Paradis to evaluate the minor. Dr. Paradis, like Drs. Doty and Taradis, recommended a residential treatment facility.

During argument to the court, the minor's counsel pointed out that the concerns of the probation department and CYA about protection of the public due to the minor's escalating assaultive behavior, coupled with the treatment guidelines identified by CYA, could all be met by committing the minor to the Sacramento County Boys Ranch, followed by a year commitment to the county jail's HALT program, where he would receive additional schooling, as well as vocational and psychological counseling.

While the court recognized the minor's difficult upbringing and that he "did very well" while being evaluated at CYA, the court was extremely concerned that the minor's fire setting, his animal abuse, and his assaultiveness were indicators of deeper problems. The court found "shocking" the assault at the service station, which easily could have resulted in the death of the victim. The court expressly rejected the Boys Ranch followed by a commitment to the HALT program in county jail because these programs were "designed for short-term intervention" and the minor needed long-term care.

In essence, the minor argues that the court abused its discretion by failing to accord proper weight to his behavioral improvement, which was shown by his conduct at CYA and in juvenile hall, when it rejected his proposed disposition. We disagree.

The court's analysis was lengthy and well thought out. The court considered the minor's entire record, specifically taking into account that he had had a "very, very tough life" and that he had done "very well" at CYA. And while the court was impressed with the minor's behavioral turn around, it was rightly concerned that his fire setting, his animal cruelty, and his extreme aggressiveness as shown by the latest assaults, were indicative of deep-seated problems that the "short-term" programs provided by the Sacramento Boys Ranch and HALT were insufficient to address. As admitted by counsel for the minor, the Sacramento Boys Ranch and the HALT program would be available to the minor for only a year and a half, whereas a

commitment to CYA could be for much longer. Additionally, the court's conclusion that the minor was in need of the long-term care provided by CYA was supported by both the Sonoma County and the Sacramento County probation departments, as well as the evaluators at CYA.

Consequently, we conclude there was no abuse of discretion by the court in making the CYA commitment.

II

The minor contends the court incorrectly calculated his maximum term of confinement. We agree.

In determining the minor's maximum period of confinement, the court imposed as the principal term the witness intimidation offense, a violation of Penal Code section 136.1, subdivision (a)(1), stating that the offense "can carry up to 4 years of confinement." The court then imposed consecutive effective terms of one year each for the battery with serious bodily injury and the conspiracy to commit assault offenses, for a total confinement period of six years.

The maximum punishment for a violation of Penal Code section 136.1, subdivision (a)(1) is three years.[2] Four years is

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[2] Penal Code section 136.1, subdivision (a)(1) provides in relevant part: "(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law."

the punishment for a violation of subdivision (c)(1) of the same section, which involves use of force or threat of force in the intimidation.[3] Because the minor was charged with and admitted violating subdivision (a)(1), not subdivision (c)(1) of the statute, the court erred in imposing the four-year term.

The People contend that the court committed no error because the facts of the offense show that the intimidation was by threat of force, thereby showing that the offense was that described by Penal Code section 136.1, subdivision (c)(1). The point is irrelevant. Since an accused cannot be convicted of an offense not charged against him, whether or not there was evidence to show that he had committed that offense (*People v. Cannady* (1972) 8 Cal.3d 379, 389), it necessarily follows that he cannot be punished for an offense of which he was not convicted.[4]

Where an offense is made punishable by imprisonment in the state prison without specifying any specific term, the triad is 16 months, two, or three years. (Pen. Code, § 18.)

[3] Subdivision (c) of Penal Code section 136.1 provides, in relevant part: "Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances: [¶] (1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person."

[4] The following is the colloquy between the court and the minor: "Q. Do you admit also that on or about September seven you did willfully, knowingly, maliciously prevent and dissuade

III

After the court had committed the minor to CYA, it calculated the minor's maximum period of confinement. The court decided it would not aggregate the minor's previously sustained petitions, but would use only the two petitions before it in making its calculation.

The minor contends the matter must be remanded for the juvenile court to exercise the mandatory discretionary determination of his maximum period of confinement as required by section 731, subdivision (b).

Relying on *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the People urge that the minor forfeited the issue by "failing to object to the juvenile court's alleged failure to 'make or articulate its discretionary sentencing' choice." Alternatively, the People contend that if their forfeiture argument fails, the juvenile court complied with the statute. We reject both of the People's positions.

Operative January 1, 2004 (see Stats. 2003, ch. 4, §§ 1, 52), section 731 was amended to read, in pertinent part, as follows: "*(b)* A minor committed to the Department of the Youth Authority may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment which could be imposed upon an adult convicted of the offense or

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Daniel B., a witness and victim, from attending and giving testimony at a proceeding -- hearing -- authorized by law in violation of section 136.1(a)(1) of the Penal Code[,] a felony; do you admit that as well? [¶] A. Yes, I do."

offenses which brought or continued the minor under the jurisdiction of the juvenile court. *A minor committed to the Department of the Youth Authority also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section."* (Amendment indicated by italics.)

The amendment to section 731 "requires the trial court to set a maximum term of physical confinement at CYA based on the particular facts and circumstances of the matter or matters that conferred jurisdiction over the minor in the juvenile court." (*In re Jacob J.* (2005) 130 Cal.App.4th 429, 432; accord, *In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1543.) And where the record is silent or shows that the court failed to make the required determination, remand is required. (*In re Jacob J., supra,* 130 Cal.App.4th at pp. 437-439; *In re Carlos E., supra,* 127 Cal.App.4th at p. 1543.)

As to the People's assertion that pursuant to *Scott, supra,* 9 Cal.4th 351, the minor's failure to object to the juvenile court's discretionary sentencing choice forfeits the issue for appeal, such is not the case. As noted above, section 731, subdivision (b) "requires" the court to exercise its discretion in determining the minor's maximum period of confinement based upon the facts and circumstances which brought the minor before

the juvenile court. "'"[A] ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]" [Citation.] "Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]" [Citation.]' (*People v. Downey* (2000) 82 Cal.App.4th 899, 912.)" (*In re Sean W.* (2005) 127 Cal.App.4th 1177, 1181-1182.) Consequently, the minor's failure to object does not forfeit the issue for appeal.

Alternatively, the People claim the juvenile court complied with section 731, subdivision (b) because the court discussed the facts of the petitions and chose not to aggregate any prior sustained petitions. We are not persuaded by the argument.

The court's discussion of the facts and circumstances of the minor's past and present cases was made in the context of determining whether CYA was the appropriate disposition for the minor, not for determining the minor's maximum period of confinement. Similarly, the juvenile court's choice not to use previously sustained petitions in calculating the maximum confinement period, an alternative long provided for by section 726, subdivision (c),[5] was made in recognition of the minor's

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[5] In relevant part, section 726, subdivision (c) states, "If the court elects to aggregate the period of physical confinement on multiple counts or multiple petitions, including previously sustained petitions adjudging the minor a ward," the maximum

improved behavior. As to the last two petitions, the court imposed the maximum period of confinement it believed was available to it. We find nothing in the record that suggests the court was aware that it could impose less than the theoretical maximum confinement period for these presently sustained offenses.[6] Consequently, remand to assure compliance with section 731, subdivision (b), is required.

DISPOSITION

The order committing the minor to CYA is affirmed. The juvenile court's finding that the maximum period of confinement for the minor is six years is vacated. The matter is remanded with directions for the court to exercise its discretion in setting the minor's maximum term of confinement in accordance with Welfare and Institutions Code section 731, subdivision (b).

DAVIS, J.

We concur:

SCOTLAND, P.J.

BUTZ, J.

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period calculation shall be made pursuant to Penal Code section 1170.1.

[6] We note that the disposition hearing took place on October 7, 2004, which was prior to any appellate court having construed the recent amendment to section 731.